IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS

[JUDGES GRIBBS, KELLY, AND SAWYER]

MARCIA SNIECINSKI,

Plaintiff-Appellee,

vs.

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Defendant-Appellant.

/

Supreme Court No. 119407
Court of Appeals No. 212788 C
Wayne Circuit 96-616254-CZ
(Hon. Marianne O. Battani)

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DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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II. STATEMENT OF QUESTIONS INVOLVED

1. Whether the court of appeals erred in concluding that BCN and BCBSM were "run as one" when they remained at all times separate corporate entities?

   Defendant says: "Yes."

2. Whether this Court should set aside the judgment below when no evidence exists establishing the necessary causal connection between the alleged discriminatory animus of BCN employee Curdy the administrative expiration of plaintiff's job offer by BCBSM?

   Defendant says: "Yes."

3. Whether the court of appeals erred in labeling this a "direct evidence" case and then compounded this error by failing to address defendant's burden in a "direct evidence" case, that it would have made the same employment decision despite plaintiff's pregnancy status?

   Defendant says: "Yes."

3. Whether the court of appeals erred in failing to cut-off economic damages after plaintiff voluntarily resigned her employment at BCN and never looked for a job thereafter, and instead permitted plaintiff to rely on job search efforts that she undertook more than two years prior to the date that she resigned, when Michigan law requires a prospective (future) effort to mitigate damages?

   Defendant says: "Yes."

4. Whether the court of appeals erred in concluding that plaintiff satisfied her duty to mitigate damages following her voluntary resignation in September 1996 by enrolling in college on a casual basis instead of looking for work as required by Michigan law?

   Defendant says: "Yes."

5. Whether the court of appeals erred in affirming the award of non-economic damages when plaintiff failed to introduce specific and definite evidence to support such an award?

   Defendant says: "Yes."

III. STATEMENT OF MATERIAL FACTS

1. BCN AND BCBSM ARE SEPARATE CORPORATIONS

Plaintiff was employed by Blue Care Network of East Michigan ("BCN") as a Telemarketing Representative. BCN and defendant BCBSM are separate corporations. Each has its own Board of Directors, its own employees, its own internal policies and its own union contracts (300-301a). Each is independently authorized to do business in the State of Michigan as a non-profit health care corporation (477-481a).

2. PLAINTIFF'S EARLY EMPLOYMENT AT BLUE CARE NETWORK OF EAST MICHIGAN

Plaintiff's work life at BCN was generally a positive one, although she did experience difficulties with her pregnancies. After a complicated pregnancy, which required medical leave in April 1989, plaintiff gave birth to a daughter in October of that year, and returned in November. She became pregnant again in 1992, but miscarried in February 1993 (124-126a).

Beginning in 1990 or 1991, Michael Curdy ("Curdy") became plaintiff's supervisor at BCN (197a). During Curdy's supervision of plaintiff, he consistently:

1. Rated plaintiff's work performance positively as "well qualified" (206a).

2. Approved periodic raises for plaintiff resulting from these favorable reviews (205a).

3. Never denied plaintiff any time off for any reason, including time needed to deal with pregnancy complications (207a, 210-212a). [Even plaintiff admitted that Curdy was "good" about approving time off (210a].

4. Approved all of plaintiff's requests for tuition reimbursement with no complaint beginning five months after the birth of her daughter (202-204a).

During the time plaintiff reported to Curdy she was also presented with a special recognition award (122a).

Curdy also treated other women well. Renee Cole ("Cole") was Curdy's secretary at BCN. Cole, who was a single mother of two children, testified that Curdy was "very courteous and helpful" in allowing her to take time off work to care for her child (454-456a).

Cole became pregnant during the time she was supervised by Curdy. Cole also worked with other women in the department who were pregnant. Cole never heard these other pregnant women, named Molly Warshaw and Debbie Byer, complain that Curdy treated them poorly because they were pregnant. Moreover, plaintiff never complained to Cole about having any problems with Curdy (456a).

Neither plaintiff nor any other witness was able to describe even one example of Curdy taking negative action against plaintiff for any reason, much less her pregnancy, at any time.

3. THE MERGER OF THE MARKETING DEPARTMENTS OF BCBSM AND BCN AND BCBSM'S OFFER TO EMPLOY PLAINTIFF AS AN ACCOUNT REPRESENTATIVE

In 1992, a plan was developed to merge BCN's marketing department into the marketing department of the parent company, BCBSM, called the "Sales Effectiveness Project." Prior to the Sales Effectiveness Project, there existed two separate and distinct marketing departments, one operated by BCBSM and the other operated by BCN. The sales representatives of these two separate departments each would call on the same customers, selling different health insurance products. Customers found that having two different "Blues" representatives calling on them for business was very confusing. The Sales Effectiveness Project was designed to merge the two departments by BCBSM hiring BCN marketing representatives to positions within the BCBSM

marketing department. Thus, the marketing departments were separate and distinct entities prior to the merger (316-317a).

Plaintiff, who worked as a Telemarketer for BCN, applied for a position as an Account Representative (AR) at BCBSM. Plaintiff interviewed for the AR position on August 18, 1993, with Donald Whitford ("Whitford"), BCBSM Regional Sales Director, Donald Roseberry ("Roseberry"), BCBSM Sales Team Manager, and Curdy (136a, 277a, 314a). Roseberry was included in the selection process to supply expertise about BCBSM employees while Curdy, who was employed by BCN, was included to provide knowledge of BCN employees (320-321a). Collectively, Whitford, Roseberry, and Curdy made the decision to offer BCN employees' positions in the BCBSM marketing department (360-361a).

Plaintiff testified that the August 18th interview went "very well" (137a). At the time of the interview, however, plaintiff did have a documented history of unpaid time off work. According to BCN attendance records, unchallenged at trial, plaintiff accrued 25 hours of unpaid time in 1991, 80 hours of unpaid time in 1992, and 48 hours of unpaid time in 1993 (397-399a, 468-476a). This history of unpaid time concerned Whitford, and he felt it was important to advise plaintiff that when she became an employee of BCBSM, that she would be subject to BCBSM corporate attendance standards (363a). According to plaintiff, Curdy asked her at the conclusion of the interview, "You have a problem with your pregnancies and we need to discuss the attendance of that" (137-138a). Plaintiff indicated that she incurred unpaid time due to past problem pregnancies and when her father was ill (332a). The interview then ended.

A second interview was held with plaintiff on August 25, 1993. This time only Whitford and Roseberry were present. (332a). When the sales unification became effective, Roseberry was to become plaintiff's new Sales Team Manager at the BCBSM Saginaw Sales Office, as well

as her immediate supervisor. Curdy, on the other hand, would be assigned the position of Sales Team Manager in the BCBSM Flint Sales Office, nearly 100 miles away from plaintiff's office (461a).

Plaintiff testified that this second interview also went "very well" (139a). According to plaintiff, at the conclusion of the interview, Whitford and Roseberry said, "You've been awarded the [AR] position in Saginaw and Tuscola County. Congratulations and welcome aboard" (Id.).

Plaintiff felt great about receiving the job offer (143a). Plaintiff accepted, and then informed Whitford and Roseberry that she was pregnant. Plaintiff testified that both men then congratulated her (146a, 191a).

4. BCBSM HOLDS PLAINTIFF'S JOB OPEN FOR HER FOR NEARLY FIVE MONTHS BUT WHEN SHE CEASED TO BE A BCN EMPLOYEE ON MARCH 1, 1994, SHE ALSO LOST ENTITLEMENT TO THE AR JOB AT BCBSM

BCN's disability policy permits employees to take short-term leave for five months (389a). On the first day of the sixth month of a short-term disability leave, that benefit expires, and the employee must either return to work or apply for long term disability (LTD) benefits (Id.). If a BCN employee is unable to work on the first day of the sixth month because of a continuing disability, he or she is enrolled in the BCN LTD program and receives the financial benefits associated with that program. Notably, the employment relationship with BCN terminates when LTD begins (392a). Upon reaching LTD status, the employee is administratively terminated (separated) from his/her employment at BCN, and receives a final paycheck and benefits payout. Accrued seniority is lost. (392a, 395a).

In the event an individual on LTD later recovers from her injury or illness, she has no right of rehire at BCN (Id.). If such individual is interested in becoming employed by BCN again, the person must apply for open positions as they become available, as there is no

obligation on the company to secure that individual a position (393a). If the former employee does manage to get a job, the employment relationship with BCN begins anew (429a, 464-467a).

Unfortunately, beginning on approximately September 10, 1993, plaintiff began having difficulties with her pregnancy and, in compliance with doctor's orders, took time off work (146-147a). Quite unexpectedly, plaintiff's medical leave extended unabated for the entire length of her pregnancy (150a). Plaintiff testified that she was completely medically unable to work from September 10, 1993 through six weeks postpartum, May 26, 1994 (224a).

On November 22, 1993, the unification of the BCBSM and BCN marketing departments occurred (335a). In anticipation of this event, on November 19, 1993, the BCN Human Resources department completed the necessary paperwork to separate the BCN marketing employees from their employment at BCN so that they could be formally hired by BCBSM (396-397a). Plaintiff was not included in this process because as testified by BCBSM Human Resources Senior Service Representative William Toples, one could only become an employee of BCBSM if he or she actually began working (445-449a). Absent this critical step of reporting to work, the AR job was just "an invitation to join" the company (448a). "[U]ntil the day they come through the door," an individual is not considered an employee of BCBSM. (Id.).[1]

Plaintiff was not present at work on the unification of November 22, 1993, because she was off on a short-term leave of absence due to her pregnancy. Accordingly, plaintiff was not separated from her employment at BCN on November 19th because she was still receiving short-term disability benefit payments from BCN. BCN (and not BCBSM) paid plaintiff's salary

[1] By requiring one to begin working before he or she is classified as an employee, BCBSM follows Michigan law that holds that at will employment begins only when an individual actually starts working. Cunningham v. 4-D Tool Co., 182 Mich App 99, 106-107; 451 NW2d 514 (1990). Although plaintiff had the completely original idea that she could have become a BCBSM employee by just signing papers (148-149a), the evidence and the law are to the contrary (446-449a).

continuation benefits for the entire time she was on short-term disability leave, September 10, 1993 through February 28, 1994 (393-395a). Thus, plaintiff remained an employee of BCN during her entire pregnancy leave.[2]

When plaintiff departed on short-term leave on September 10, 1993, she had no knowledge that she would be absent from work the entire term of her pregnancy (147a). Neither did Whitford, who assumed plaintiff would return in a short period of time. Thus, the offer to employ plaintiff as an AR remained "on the table" despite her pregnancy (151-152a).

During her short-term disability leave, for example, plaintiff remained listed on the BCBSM Michigan Sales and Service East Michigan Organization Chart as an AR (461a). This Organization Chart, dated December 9, 1993, shows that the Sales Department fully anticipated plaintiff's eventual employment at BCBSM as an AR despite her pregnancy complications.

In addition, on December 8, 1993, Mr. Roseberry sent the following memorandum to his team:

> As a follow-up to our recent conversation on handling Marsha's [sic] groups in her absence, please reference the attached temporary assignments. Each page notes who will handle calls during Marsha's [sic] absence. When Marsha [sic] returns, all of these calls should be directed to Marsha [sic] until other arrangements are made. (462a) (Emphasis added).

The Roseberry memorandum further illustrates that plaintiff's anticipated return to assume her position at BCBSM was fully expected notwithstanding her complications due to her

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[2] While plaintiff was on short-term leave, Whitford, Curdy, and BCN Human Resources Manager Patricia Stone ("Stone") had some conference calls about the prudence of keeping an earlier January 27, 1993 disciplinary warning memo for attendance in plaintiff's file. Ms. Stone's Franklin Planner log entry for September 11, 1993 indicated that "Don [Whitford] wanted threat in personnel file." Ms. Stone explained that the reference to "threat" was not meant to suggest that anyone actually intended to harm another person. Rather, "threat" referred to the January 27, 1993 disciplinary memo (413-424a). After these conference calls, Stone concluded that Curdy had not properly followed BCN company "protocol" in preparing the memo back on January 27th and, therefore, removed the warning from plaintiff's file (419-420a). As far as her record was concerned, the warning memo never existed. Moreover, Stone testified that the September 11th conversation was about plaintiff's attendance problems, not her pregnancy (422-424a).

pregnancy. In addition, Whitford instructed Roseberry that he could not fill plaintiff's position during her short-term leave of absence period (339-340a).

5. PLAINTIFF WAS TREATED PROPERLY UNDER THE SHORT-TERM AND LTD POLICIES

On March 1, 1994, plaintiff's short-term disability benefits ended at the conclusion of five full months (392-395a). This is a date of significant importance. On March 1, 1994, BCN terminated plaintiff's employment and converted plaintiff to LTD status in accordance with the terms of the BCN LTD plan. BCN then issued plaintiff a vacation pay out and an incentive pay out. (Id.). Plaintiff does not dispute BCN's neutral application of its short-term and LTD policies on her in this case.

The AR jobs were offered to BCN employees on a one-time basis. When plaintiff was converted to LTD status, on March 1, 1994, however, she administratively lost her status as a BCN employee and, consequently, her right to the AR job at BCBSM. However, as Whitford explained at trial, from the unification date of November 22, 1993 until plaintiff was converted to LTD status effective March 1, 1994, plaintiff's AR job was reserved specifically for her, no questions asked (340-341a).

On October 13, 1993, plaintiff and BCN HR Manager Stone spoke on the telephone. Plaintiff was concerned about "job security." (463a). Ms. Stone advised plaintiff that if her short-term leave extended to LTD, she would lose her right to the BCBSM job. (Id. and 407-408a).[3]

[3] Although plaintiff denied that Stone had accurately explained the negative consequence that enrolling in LTD would have on the BCBSM offer (153a), Stone's testimony, confirmed by her Franklin Planner notes, indicated that she told plaintiff the AR job could not be hers if she went on LTD. If LTD happened, Stone noted, the "BCBSM job not possible" (463a). Realistically speaking, of course, it would not have made a difference if, as plaintiff claims, Stone did not inform her of the consequences of going on LTD. Plaintiff's understanding of the policy would not have altered its automatic application to her case.

The BCBSM Human Resources department advised Whitford that he had the right to fill plaintiff's AR job once she was converted to LTD status (335-336a, 340a). Stated differently, the neutral application of BCN's LTD policy led to the administrative expiration of plaintiff's job offer at BCN, not her pregnancy. [4]

6. PLAINTIFF'S RE-EMPLOYMENT AT BCN AND SUBSEQUENT VOLUNTARY RESIGNATION TWO YEARS LATER

On May 20, 1994, after the birth of her child, plaintiff telephoned BCN Human Resources Manager Stone to inquire about her status (154-155a). Stone told plaintiff that her BCN job had been eliminated (as had all BCN marketing jobs) (154a). This, of course, was inevitable since BCN no longer had a marketing department. Stone then called the BCBSM Human Resources department to ask if the AR position was still open (434-435a). (There was, of course, the possibility that the position had not yet been filled, and plaintiff could apply for the job as a new employee.). Joel Gibson, Manager of Human Resources at BCBSM, advised Stone that the job, although still open, could not be filled because of a hiring freeze (435a). As several witnesses testified, including Kathy Elston, Vice President of Marketing and Sales for BCBSM, the freeze was imposed because BCBSM Medicare employees were scheduled to lose their positions and, therefore, were given priority over all other applicants for open jobs. As a result, until all Medicare employee placements were complete, no hiring from outside the company was allowed (374-377a).

As it turned out, the AR position was not filled by a Medicare employee and therefore remained open until December 1994, when it was "unfrozen" and filled internally from

[4] Apparently, plaintiff believes that the AR job offer should have remained open for her during her short and long term disability leave. This would have been an unprecedented deviation from company policy. Section 402 of ERISA requires that all benefit plans be established pursuant to a written plan document. 29 USC §1102. Section 404 requires that plan fiduciaries operate and maintain all ERISA plans pursuant to the terms of this written plan document. 29 USC §1104. A fiduciary has no discretion to change the clear terms of the plan. Thus, pursuant to the LTD plan, upon reaching five full months of short-term disability, employees are subject to those plan terms, which includes termination of active employment status at BCN at that time.

BCBSM's ranks by Kym MacDonald (341-345a). Plaintiff did not apply for this posted vacancy (345a).

In the meantime, during the spring of 1994, Plaintiff filed for unemployment benefits with the Michigan Employment Security Commission (234-235a). Plaintiff collected unemployment benefits from May until December 1994. During this seven month period, plaintiff spoke to four companies to see if they had openings (235-237a), communicated with BCN Human Resources "frequently" (158a), "went through the yellow pages" and contacted a "variety of other sources" (159a), although plaintiff could not remember these " other sources" at trial (236-237a).

In December of 1994, a member of Stone's staff called plaintiff about a job opening at BCN for a non-group marketing representative (160-161a). Plaintiff accepted this job and was rehired by BCN effective December 16, 1994 (166a). Plaintiff testified that once she was rehired at BCN, she ceased all efforts to look for any other work (237a).

Nearly two years later, in August 1996, plaintiff read a posting for an AR job at BCBSM. Believing that she should have been given that job because it had been offered to her in August 1993, plaintiff tendered her voluntary written resignation to BCN effective September 20, 1996 (18a, no. 21, 178a, 459a). In this resignation letter, plaintiff makes no mention of any discrimination involving Curdy or others or her failure to receive the AR position over two years earlier. Plaintiff thanked BCN for the years of experience with the organization (459a).

Plaintiff concedes that she made no efforts to look for any type of work after she quit BCN on September 20, 1996 (234a). Plaintiff remained unemployed from the day she quit BCN through the date of trial.

IV. STANDARD OF REVIEW

The standard of review on defendant's Motions for Directed Verdict and for Judgment Notwithstanding the Verdict was described in Haberkorn v. Chrysler Corp., 210 Mich App 354, 533 NW2d 373 (1995) as follows:

> This Court must review all evidence presented up to the time of the motion in the light most favorable to the Plaintiff in order to determine if there is a genuine issue of material fact.

The denial of defendant's Motion for Remittitur is reviewed under a "clearly erroneous" standard. Weiss v. Hodge, 223 Mich App 620, 567 NW2d 468 (1997).

Plaintiff alleged that defendant engaged in intentional discrimination in violation of the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2102 *et seq.*; MSA 3.548(101) *et seq.* In order to establish a prima facie case of intentional sex (pregnancy) discrimination, a plaintiff must show that she was a member of a protected class, that she was discharged or otherwise discriminated against with respect to employment, that the defendant was predisposed to discriminate against persons in the class, and that the defendant acted upon that disposition when the employment decision was made. Downey v. Charlevoix County Bd. Of Road Comm'rs, 227 Mich App 621, 632; 576 NW2d 712 (1998).

The law prohibits employers from acting in a discriminatory manner, for example, discharging, disciplining, or refusing to hire a woman because she is pregnant. As the Court of Appeals explained in Harrison v. Olde Financial Corp, 225 Mich App 601, 606; 572 NW2d 679 (1997):

> ... the plaintiff always bears the burden of persuading the trier of fact that the employer acted with illegal discriminatory animus. Second, whatever the nature of the challenged employment action, the plaintiff must establish evidence of [her] qualification (or other eligibility) and direct proof that the discriminatory animus was causally related to the decision makers action. (Emphasis added).

V. ARGUMENT

A. THE COURT OF APPEALS ERRED IN CONCLUDING THAT BCN AND BCBSM WAS "RUN AS ONE" WHEN THEY REMAINED AT ALL TIMES SEPARATE CORPORATE ENTITIES

At trial, Curdy offered his opinion that while he believed that BCN was a wholly owned subsidiary of BCBSM, "we [BCN] considered ourselves one company" with BCBSM (298a). Apparently, the panel below relied on this one sentence of transcript to conclude that BCBSM and BCN were "run as one" (48a), thereby implying that the two corporations simply were one big interrelated entity.

While there was interaction between BCBSM and BCN management personnel in coordinating the unification of the two sales forces, as one might expect with such a large venture, BCN and BCBSM remained at all times two separate corporations. Each existed with its own separate Board of Directors, its own employees, its own internal policies and union contracts (300-301a). Each is independently authorized to do business in the State of Michigan as a non-profit health care corporation (477-481a). The fact that BCBSM is BCN's parent does not negate the independent corporate status of the two or compromise the protections that status entails. As the court of appeals in Maki v. Cooper Range, 121 Mich App 518, 524, 328 NW2d 430, (1983) explained:

> ... courts have recognized that majority stock ownership and common directors and officers, alone, will not provide a sufficient basis for disregarding the fiction of these corporations' separate existence. A subsidiary corporation must be a `mere instrumentality' of the parent before its corporate entity will be disregarded. (citation omitted).

Michigan law respects the independent corporate status of parents and subsidiaries absent a clear showing of fraud. Chrysler Corp. v. Ford, 972 FSupp 1097 (ED Mich 1997) (interpreting

Michigan law); Seasword v. Hilti, 449 Mich 542; 537 NW2d 221 (1995); Wells v. Firestone, 421 Mich 641; 364 NW2d 670 (1984). Significantly, plaintiff in this case did not allege fraud.

Plaintiff tricked the jury into believing her deliberately misleading assertion that BCN and BCBSM were just one big unified entity in which employees could float freely from a job at one company to a job at the other company, without regard to corporate independence, internal policies, or any other procedural obstacle that might pose an inconvenience. The success of plaintiff's lawsuit depended upon the jury's acceptance of this disingenuous, monolithic picture of two companies. From this false image, plaintiff drew her claim that, as a former employee of BCN, she could just slide into a new job at BCBSM no matter what company policy or the law provided.

There is no evidence that BCN and BCBSM were "run as one," and the panel below seriously erred in reaching this conclusion through Curdy's one line testimony made at trial. [5]

B. THIS COURT SHOULD SET ASIDE THE JUDGMENT BELOW AS THERE EXISTS NO EVIDENCE OF A CAUSAL CONNECTION BETWEEN THE ALLEGED DISCRIMINATORY ANIMUS AND THE ADMINISTRATIVE EXPIRATION OF PLAINTIFF'S JOB OFFER

Plaintiff's theory of discrimination can be gleaned from one question asked of her at trial:

> Q. Do you have reason to believe, though, that your pregnancy did play a part and/or reason in not getting this [AR] job?
>
> A. Absolutely. During that time it would have been after I accepted the position in September, Michael Curdy made the comment to me that I'll have to make sure I don't hire anybody in child-bearing years in the future. So, yes, I do have reason to believe it's still in his mind that he does tell Mr. Whitford and Mr. Roseberry that.

[5] Plaintiff's contention throughout this litigation and at trial was that she was "hired" by BCBSM when she "accepted" the AR job offer from Whitford and Roseberry in August 1993 (17-18a, no. 20). This is contrary to BCBSM policy (445-449a), and Michigan law, that requires one to actually begin working before he or she is classified as an employee. See Cunningham v. 4-D Tool Co., 182 Mich App 99, 106-107, 451 NW2d 514 (1990). Given that an employment relationship between plaintiff and BCBSM never began because plaintiff did not report to work, plaintiff could not have been terminated from the position of AR. Thus, the panel below erred in concluding that plaintiff was "discharged" from the AR position. (48a).

(260a) (emphasis added). Thus, plaintiff's case is built around her belief that Curdy "poisoned the waters" by convincing Whitford and Roseberry to revoke her job offer as an AR. [Plaintiff did not assert that any pregnancy animus caused her to take a disability leave that was caused by pregnancy complications.]. Curdy, it must be remembered, would not even have been plaintiff's supervisor had she worked for BCBSM following the unification (461a). Moreover, even accepting plaintiff's recollection of Curdy's statement, "I'll have to make sure I don't hire anybody in child bearing years" as true, Curdy was referring to not hiring such women in the future, not plaintiff, who was already offered the AR job. Yet as plaintiff explained at trial, "He [Curdy] definitely had the option or opportunity to taint anything for me in the future. So, yes, I do have proof that he did say something" (250-251a).

Those were plaintiff's assumptions. Here are the facts:

1. When plaintiff was asked whether she has any evidence to offer to suggest that Whitford ever had a problem with her because she had been pregnant in the past, plaintiff replied, "no." (191a).

2. When plaintiff was asked whether she has any evidence to offer to suggest that Roseberry ever had a problem with her because she had been pregnant in the past, plaintiff again replied, "no." (193a).

3. When asked how she knew Curdy had "poisoned" Whitford's mind, plaintiff testified that it was "absolutely" just her own "personal opinion" (251-252a). Plaintiff admitted that she had no idea of the type of daily contact that Curdy may have had with Whitford and Roseberry because she was not present at work to observe their interactions (251a).

4. Importantly, when asked if she had any evidence to show that Curdy and/or Whitford revoked the AR job offer in May 1994, plaintiff conceded she did not even know who revoked it (251-254a):

> I know from the facts that I have in my own proof of it all. But do I have anything to supply to you and that someone said it? No (254a) (emphasis added).

Given these admissions, the house of cards upon which plaintiff based her entire case collapsed. Plaintiff had no idea who made the decision to revoke her job offer, much less whether it was Curdy's influence on Whitford or Roseberry. Plaintiff's reliance on her "own proof" is nothing more than her wild conjecture and speculation that Curdy had some hand in the decision. There was no evidence introduced at trial that Curdy, who was on the panel that offered plaintiff the AR job when she was pregnant, played any role in the administrative separation of plaintiff's employment effective March 1, 1994 *because* she was pregnant. Indeed, Curdy worked in the BCBSM Sales Office after unification, not the department responsible for administering LTD claims. Moreover, even if Curdy tried to poison the mind of Whitford and Roseberry, there is no evidence to support plaintiff's conjecture that they would have acted in conformity with Curdy's alleged evil intentions. After all, plaintiff readily admitted on the stand that Whitford and Roseberry were not pregnancy discriminators (191-193a).

The panel below recited the burden of proof formulation in discriminatory treatment cases set forth in Harrison v. Olde Financial, 225 Mich App 601, 612; 572 NW2d 679 (1997) (Opinion by J. Young, joined by then J. Taylor and Livo, sitting by designation), yet failed to apply the formulation correctly. Under Harrison, plaintiff's burden at trial was to prove by a preponderance of the evidence that defendant acted with illegal discriminatory animus, **and** that the discriminatory animus **was causally related** to the decision-maker's action. Harrison, p. 612.

Plaintiff's theory was that Curdy sabotaged her opportunity to work at BCBSM is supported by nothing more than speculation, conjecture and innuendo on her part. This is not mere second-guessing of the jury on the part of defendant. Such conclusory and subjective belief that Curdy somehow influenced Whitford and Roseberry, as admitted by plaintiff on the witness stand, are insufficient to establish a claim of discrimination as a matter of law. Hazle v. Ford Motor Co., 464 Mich 456, 476; 628 NW2d 515 (2001); Quinto v. Cross and Peters Co., 451 Mich 358, 371, 547 NW2d 314 (1996).

Thus, the court of appeals seriously erred in not reversing the trial court's denial of defendant's motion for directed verdict and motion for judgment notwithstanding the verdict. There is no evidence establishing the necessary causal link between the alleged discriminatory animus of BCN employee Curdy and the administrative termination of plaintiff's offer of employment by BCBSM due to her failure to report to work prior to her effective LTD date of March 1, 1994. Therefore, defendant requests that this Court set aside the judgment below and dismiss plaintiff's case for failure to establish disparate treatment discrimination.[6]

C. THIS COURT SHOULD ARTICULATE CLEARLY THE BURDEN OF PROOF IN "DIRECT EVIDENCE" DISPARATE TREATMENT CASES AS THE COURT OF APPEALS SERIOUSLY ERRED IN LABELING THIS AS A "DIRECT EVIDENCE" CASE

Plaintiff attempted to establish pregnancy discrimination by referring to several comments made by Curdy. Curdy's comments as described by plaintiff were:

a. In early 1993, plaintiff once sat down in a chair recently vacated by an employee who just returned from maternity leave. Since plaintiff was in the process of announcing her pregnancy at the time, Curdy remarked that he shouldn't allow women to sit in that chair because it seemed to be a "pregnancy chair" (128-129a).

[6] Defendant questions the propriety of the suggestion by the panel below that the failure of Whitford, Roseberry, and Curdy to return plaintiff's telephone calls may be indicia of evidence of discrimination based on pregnancy. (48a). To hold an employer liable for discrimination for failing to return telephone messages is an unfair standard to place on employers, and one that finds no support in the law. At trial, BCN Human Resources Manager Stone testified that it is BCN's practice not to communicate with employees on sick leave except on benefit questions, in order to allow such employees to rest and get well. (403-404a).

b. Plaintiff claimed that when she became pregnant in 1992, Curdy asked her if she might have problems "like she did in 1989" (129-130a).

c. In the same conversation referenced in subparagraph (b), when discussing the possibility of complications during pregnancy, Curdy said if you have such complications, "we'll have to deal with that problem when it comes" (131a).

d. At the conclusion of plaintiff's August 18, 1993 job interview, plaintiff claims Curdy said, "You have a problem with your pregnancies and we need to discuss the attendance of that" (137-138a).

e. Sometime in September 1993, Curdy said, "I'll have to be sure to never hire anybody in child bearing years again" (198a).

Curdy denied making these comments (286-292a) and no one corroborated plaintiff's testimony on these points. Nevertheless, defendant will assume for purposes of this Appeal that Curdy made the comments exactly as plaintiff described them.

The court of appeals held that these five comments, spread out over several years, were sufficient evidence to show that Curdy "acted on a discriminatory predisposition when plaintiff was discharged from the AR position," labeling these comments "direct evidence" of discrimination (47-48a).

Defendant disputes the conclusion of the court of appeals that this is a "direct evidence" case as the remarks fail the four factor test for relevancy of "stray remarks" as recently enunciated in Krohn v. Sedgwick James of Michigan, 244 Mich App 289; 624 NW2d 212 (2001).

In Krohn, defendant requested the trial court to exclude the statement "out with the old and in with the new" made by plaintiff's former supervisor. Plaintiff asserted that this was an ageist statement that constituted direct evidence that she was fired because of her age as part of defendants' plan to terminate older employees and replace them with younger employees. Defendant claimed that the comment was irrelevant. 624 NW2d at 212.

The court of appeals held that in interpreting the relevancy of stray remarks in employment discrimination cases, courts should consider the following factors:

> (1) Was the disputed remark made by the decision-maker or by an agent of the employer uninvolved in the challenged decision? (2) Was the disputed remark isolated or part of a pattern of biased comments? (3) Was the remark made close in time or remote from the challenged decision? (4) Was the disputed remark ambiguous or clearly reflected of discriminatory bias? 624 NW2d at 214.

In the case at bar, the remarks attributable to Curdy fail the Krohn test for the relevancy of stray remarks. The first factor of the test requires that the remark must be tied to the act of a decision-maker. In this regard, the court in Krohn cautioned, "[r]emarks made by a single employee that are offered to show a discriminatory motive by a defendant corporation involve a particularly high risk of unfair prejudice." 624 NW2d at 218. Curdy was not an employee of defendant when he made any of the alleged comments, all of which occurred prior to the unification. Rather, Curdy was a BCN employee. Importantly, plaintiff introduced no evidence showing that Curdy played a decision-making role in the administrative expiration of her AR job offer that occurred on March 1, 1994, when plaintiff entered LTD status (251-254a). It is highly prejudicial to defendant for the statements of Curdy, who was not employed by BCBSM at the time he made the remarks, to be used to show discriminatory motive on the part of a separate entity, BCBSM, particularly when Curdy played no role in revoking plaintiff's job offer.

Turning to the second factor of the Krohn test, plaintiff testified that Curdy began playing a management role vis-a-vis her employment at BCN as early as 1989 (202a). The few isolated comments attributed to Curdy, spread over several years of his supervisory relationship with plaintiff, hardly constitutes a "pattern" of discrimination described by the Court in Krohn.

The third factor strongly weighs against a finding of direct evidence of discrimination. By plaintiff's own admission, the Curdy comments were made between one to over two years

prior to the date of the administrative expiration of plaintiff's job offer, March 1, 1994. In Krohn, the court of appeals held that the decision maker's comment, made more than two years prior to plaintiff's termination, was sufficiently isolated and remote in time from the adverse action to make the alleged ageist comment relevant. 624 NW2d at 218. Curdy's comment "we'll have to deal with that problem when it comes," (131a) and his questioning plaintiff on whether she might have problems with her pregnancy "like she did in 1989" (129-130a), occurred in a 1992 conversation, falls within this two-year "remoteness in time" window referenced in Krohn. Finally, the "pregnancy chair" comment (128-129a) was made in early 1993, more than one year before the administrative expiration of plaintiff's job offer. Thus, the comments all were remote in time to the challenged decision, the administrative expiration of plaintiff's job offer when she was converted to LTD effective March 1, 1994.

As to the final factor enunciated in Krohn, most of the comments attributable to Curdy are ambiguous. Curdy's comment that a certain chair was a "pregnancy chair" is vague and pregnancy neutral. His question to plaintiff when learning that she was pregnant in 1992, that if she had pregnancy problems like in 1989, "we'll have to deal with that problem when it comes," (131a), is susceptible to more than one interpretation. Curdy easily could have meant that if plaintiff developed problems like in the past, then she would be entitled to take time off work as he allowed plaintiff to do with her earlier pregnancies. The statement plaintiff claims Curdy made at the conclusion of the August 18, 1993 interview ("You have a problem with your pregnancies and we need to discuss the attendance of that" (137-138a)), also is susceptible to a non-pregnancy interpretation. Given that plaintiff did have a well-documented history of unpaid time off work (397-399a), Curdy's inquiry was a legitimate method of addressing plaintiff's attendance problem at the interview.

The legal error committed by the panel below in construing this matter as a "direct evidence" case when it is not, is further exacerbated by the Court's failure to consider defendant's justification for administratively terminating plaintiff's offer of employment. In a case involving direct evidence of discrimination, a defendant has the opportunity to demonstrate that it would have reached the same decision without considering the employee's protected status. Harrison, 225 Mich App at 611.

Within one month after Whitford and Roseberry extended plaintiff the offer to work as an AR, plaintiff left work as a BCN employee on short-term disability leave due to her pregnancy. According to established, documented and uniformly applied BCN policy, an employee's short-term disability leave expires on the first day of the 6th month of that leave. At that time, the employee must either return to work or enroll in LTD. If an employee is unable to work on the first day of the 6th month because of continuing disability, the employee is administratively terminated from BCN, issued a final paycheck, and is enrolled in the LTD program. (389-392a).

Plaintiff began LTD on March 1, 1994. At that time, plaintiff lost her status as a BCN employee and, consequently, her right to the AR job. (335-336a, 340-341a).

In the case at bar, the court of appeals erroneously concluded that the record supported a finding that Curdy acted on his predisposition to discriminate when plaintiff was "discharged" from the AR position. (48a). The court was obligated to go on, however. Even assuming plaintiff met her burden, the court then should have decided whether BCBSM would have made the same decision to revoke plaintiff's job offer even if she were not pregnant. Harrison, supra; Rollert v. Dept of Civil Rights, 228 Mich App 534, 579 NW2d 118 (1998). The court of appeals simply failed to address this critical, decisive issue. Put simply, the court of appeals imposed a

type of strict liability standard by concluding that once direct evidence was established, liability was automatic. This is plainly wrong.

The record below indisputably established that the neutral operation of the BCN LTD policy caused the administrative expiration of plaintiff's job offer. Her pregnancy had nothing whatsoever to do with it.[7] The panel noted in its Opinion that defendant's position was that plaintiff lost the AR job in accordance with BCN's LTD policy (47a, n. 1). However, the panel then completely failed to consider the legitimacy of this non-discriminatory reason. Such failure amounts to a clearly erroneous application of the direct evidence paradigm and requires clarification from this Court as to the respective burdens in a direct evidence case, as the opinion below so aptly illustrates.

Even though the panel below failed to consider or decide whether BCBSM would have made the decision to revoke plaintiff's job offer even had she not been pregnant, a remand is not necessary for two reasons. First, this case does not involve "direct evidence" of discrimination. All of the alleged discriminatory comments were made by an individual then employed by BCN, not BCBSM, and were too remote in time and/or ambiguous to demonstrate a nexus between the

[7] In her response Brief, plaintiff may reference a chart that she admitted into evidence, showing employees of defendant who left work on LTD. Plaintiff claimed at trial that in each instance, 89 out of 89 non-pregnant employees were placed back in their positions or comparable positions at the conclusion of their LTD leaves. Plaintiff argued to the jury that she was the only person not returned to her job at the end of her LTD leave, and that this alleged disparate treatment was evidence of pregnancy discrimination.

It is true that the chart shows 89 individuals who left on LTD and subsequently were rehired when their leave expired. Importantly, however, all 89 employees listed on the chart were employed by BCBSM. Thus, the individuals cited on plaintiff's chart are not similarly situated to plaintiff, who *as an employee of BCN*, was converted to LTD status under the BCN LTD plan. The critical distinction which plaintiff attempts to mask is the fact that plaintiff *never worked at day for BCBSM* and, consequently, the BCBSM LTD policy did not apply to her.

"decision" to "discharge" plaintiff from her position as an AR.[8]

Second, as more fully described in Part B, supra, plaintiff's entire "theory of discrimination" is based on nothing more than conjecture and speculation that Curdy somehow "poisoned the minds" of Whitford and Roseberry. Unfortunately for plaintiff, she introduced no evidence showing that Whitford or Roseberry, or Curdy for that matter, played any role in the decision to revoke her job offer. In fact, plaintiff was totally unaware of who was responsible for such revocation. (252-254a). There is no liability in this case because plaintiff did not establish a causal connection between the alleged actions of Curdy and the administrative expiration of her AR job offer. Thus, the judgment below should be set aside. Remanding this case would not change the result of no liability in this case.

D. EVEN THOUGH THERE IS NO LIABILITY IN THIS CASE, THIS COURT SHOULD TAKE THIS OPPORTUNITY TO ANNOUNCE THAT UNDER MICHIGAN LAW, WHEN A PLAINTIFF VOLUNTARILY QUITS EMPLOYMENT AS PLAINTIFF DID IN THIS CASE, ECONOMIC DAMAGES ARE AUTOMATICALLY CUT-OFF

1. Michigan law on mitigation requires a plaintiff to take affirmative steps to avoid economic loss

Mitigation of damages is a legal doctrine that seeks to minimize the economic harm from wrongdoing. Morris v. Clawson Tank Co., 459 Mich 256, 263; 587 NW2d 253 (1999). The "sole interest" in defendant, the courts, and the public in requiring plaintiff to mitigate damages is "avoiding economic loss." Id., p. 266. As this Court has succinctly explained on two occasions: "The principle of mitigation is a thread permeating the entire jurisprudence ... it is

[8] Defendant's position is that this dispute should have been analyzed under the McDonnell Douglas/Burdine paradigm as applied by this Court. See Town v. Michigan Bell Telephone Co., 455 Mich 688; 568 NW2d 64 (1997) (age discrimination); Lytle v. Malady, 458 Mich 153; 579 NW2d 906 (1998) (age and sex discrimination). At trial, defendant introduced evidence that a similarly-situated employee of BCN, Renee Cole, was hired by BCBSM to be Whitford's secretary as part of the Sales Effectiveness Project. The difference between plaintiff and Cole, who both were pregnant at the time of the unification, is that Cole reported to work on November 22, 1993, and did not miss her "window of opportunity" as did plaintiff when she was converted to LTD status effective March 1, 1994 (346-348a).

part of the much broader principle of 'avoidable consequences.'" Id. quoting Rasheed v. Chrysler Corp., 445 Mich 109, 123-124; 517 NW2d 19 (1994).

A plaintiff may not "purposefully remain unemployed or underemployed in order to maximize recoverable damages in the form of lost wages." Morris, p. 263 (emphasis added). If a plaintiff does not undertake reasonable efforts to mitigate, the result is clear: she loses the right to claim full back pay as damages. Rasheed, 445 Mich. at 124.

In its opinion, the court of appeals held that plaintiff voluntary quit her employment at BCN. (48a) ("[D]efendant correctly argues that there is no evidence to support a finding that plaintiff was compelled to resign from BCN effective September 20, 1996.").

In accordance with well-established federal law,[9] when a plaintiff voluntarily resigns without good cause, entitlement to back pay is tolled (cut off) because the individual has failed to mitigate damages. Brady v. Thurston Motor Lines, Inc., 753 F2d 1269, 1278 (4th Cir. 1985) (a plaintiff who voluntarily quits employment fails to exercise reasonable diligence to mitigate and, therefore, back pay is tolled); NLRB v. Pepsi Cola Bottling Co. of Fayetteville, Inc., 258 F3d 305, 310-311 (4th Cir. 2001) ("Complete preclusion from back pay eligibility may be appropriate in the case of an employee who never attempted to obtain a suitable job, because it is impossible to know how much the employee would have earned if he had diligently searched for an appropriate job"); EEOC v. Delight Wholesale Co., 973 F2d 664, 670 (8th Cir. 1992) (voluntary quit tolls back pay period).

[9] Michigan law concerning back pay has its roots in federal law. Rasheed v. Chrysler Corp., 445 Mich. 109, 118, 517 N.W.2d 19 (1994). In Morris, this Court reiterated that "[t]he approach of state courts on the issue of back pay/continued back pay is in harmony with that utilized by the federal courts." Morris, p. 265, n. 3 citing Rasheed, p. 123.

Cutting off damages when a person voluntarily quits a job and fails to look for work, the principle of law followed by federal courts, is entirely consistent with Morris, supra, where the Court noted that the "sole interest" in requiring plaintiff to mitigate is "avoiding economic loss." Morris, p. 266.

It is undisputed that plaintiff made no effort to look for any work following her resignation from BCN:

> Q. Since you resigned from your employment effective September 20,1996, have you made any effort to look for any other work?
>
> A. No, I have not.
>
> Q. Have you completed any applications for employment anywhere else since September 20, 1996?
>
> A. No, I have not. (234a).

In the case at bar, the court of appeals properly held that plaintiff voluntarily quit her employment at BCN effective September 20, 1996. However, it did not take the next, legally required step to rule that plaintiff's economic damages were therefore cut-off as of that date. Stated differently, a plaintiff who voluntarily quits employment as plaintiff did vis-à-vis her job at BCN, and then makes absolutely no effort to look for replacement work thereafter, cannot be considered to have undertaken efforts to "avoid" economic loss as required by Michigan law. Morris, p. 266.

This Court should provide the necessary guidance to the bench, bar, and to the public by holding that a plaintiff's mitigation effort is "unreasonable" as a matter of law, Morris, p. 267, when such individual quits employment and makes no effort to find a suitable replacement job. In other words, at the point plaintiff voluntarily quits a job and then ceases to look for any

replacement work, defendant should be entitled to a ruling by the trial court that back-pay is tolled without having to submit this issue to the jury.

The rule of law that economic damages are tolled when a plaintiff quits employment and makes no effort to look for other work is an issue of fundamental importance not only in addressing claims for back pay, but in assessing the reasonableness of front pay awards as well. In the case at bar, the jury awarded the sum of $136,000.00 as future economic damages (42-43a), an amount that the Court of Appeals approved of in its entirety. (46-52a).

In Morris, the concurring Justice correctly observed that "[t]his Court has yet to define the limits of front pay awards, and the Legislature has offered the courts no direction, despite the potential effect of such awards." Morris, p. 279. The concurring Justice also noted that front pay awards are speculative by nature and that Michigan courts have recognized the uncertainty of such awards. Id. Finally, the concurring Justice in Morris properly concluded that "[t]here is an obligation to mitigate future damages." Id., p. 280.

Defendant urges this Court extend the well reasoned analysis of the concurring Justice in Morris, and hold that like in the case of back pay, a plaintiff is not entitled to have his/her claim of front pay submitted to the jury if he/she makes no effort to mitigate damages after voluntarily quitting a job. Given that this plaintiff made no effort to look for any work after she voluntarily quit her employment at BCN (234a), the award of $136,000.00 in front pay should be summarily vacated by this Court because plaintiff's mitigation was "unreasonable" (Morris, p. 267) as a matter of law.

The jury's award of $125,000.00 for past economic damages and $136,000.00 for future economic damages is inappropriate, unduly speculative and punitive in effect, given plaintiff's admission that she looked for no work after she quit BCN. The Court should hold that plaintiff

is not entitled to any economic damages after she voluntarily quit BCN effective September 20, 1996, because she decided to forego all efforts to mitigate damages after quitting BCN on that date.

2. The court of appeals erred in allowing plaintiff to rely on job search efforts undertaken more than two years prior to the date she resigned when Michigan law requires a prospective effort to mitigate damages

Instead of cutting off back-pay effective September 20, 1996, the court of appeals held that defendant failed to prove that plaintiff had not mitigated her damages following her quitting BCN (49a). In reaching this conclusion, however, the panel took the unusual and unprecedented step of citing efforts plaintiff took to look for work that occurred two years prior to her quit date, between May and December 1994. Plaintiff undertook such efforts nearly four years before trial that began on March 24, 1998. As the court of appeals explained:

> Plaintiff testified that, from May 1994 until December 1994, she looked for a comparable job, by contacting BCN's HR department "frequently" to inquire about openings, looking in the yellow pages, and contacting insurance agencies and individuals that she knew. Defendant failed to demonstrate that plaintiff's job search in 1994 was not diligent.

(49a) (emphasis added) (citations omitted).

Under Michigan law, mitigation requires a prospective (future) effort to seek suitable alternative employment. Morris, supra, p. 271 (observing that plaintiff "made reasonable efforts to mitigate damages after August 1990") (emphasis supplied). This requirement is consistent with federal law on this subject. See, e.g., Meacham v. Knolls Atomic Power Laboratory, 185 FSupp 2d 193, 225 (N.D.N.Y. 2002) (that "following the [reduction in force]", plaintiff, among other things, prepared a new resume, checked for job listings, went on a job interview) (emphasis added).

Defendant is unaware of any cases that hold that an employee satisfies his or her duty to mitigate damages based upon a job search effort undertaken years prior to the date an employee quits work. Yet this is exactly what the court of appeals allowed plaintiff to do in this case as an excuse for not looking for work after she resigned from BCN effective September 20, 1996 (49a).[10]

The court of appeals seriously erred by failing to recognize that when plaintiff quit her employment at BCN effective September 20, 1996, she was required to make a new effort to search for work from that point forward. This is because "[w]hen a plaintiff voluntarily quits employment, he or she has freely chosen to incur loss of earnings." Brady, supra, 753 F2d at 1278 (emphasis added). Thus, when a plaintiff quits, not because of any wrongdoing committed by the employer, but of her own free will, she cannot "remain unemployed and collect a windfall." Sugg v. Service Master Educational Food Management, 72 F3d 1228, 1233 (6th Cir. 1996). Stated simply, a plaintiff who quits a job must make a prospective effort to look for replacement work. Reilly v. Cisneros, 835 FSupp 96, 100 (WDNY 1993) aff'd 44 F3d 140 (2d Cir. 1995) ("A plaintiff must demonstrate that [she] made, and is making, an effort that is reasonably calculated to find" a job) (emphasis added).

The Court of Appeals erred in several other important respects.

First, it is well settled that "[a] ritualistic compliance with the unemployment administrator's work search requirement does not necessarily constitute a reasonably diligent search for suitable employment." Truskoski v. ESPN, Inc., 823 FSupp. 1007, 1015 (D. Conn. 1993).

[10] The trial court rejected defendant's argument that damages should have been cut-off effective September 20, 1996 in denying defendant's pre-trial motion in limine. (66-73a).

After plaintiff learned on May 26, 1994 that her job at BCN had been eliminated and the AR position at BCBSM no longer was available, plaintiff filed for unemployment benefits with the Michigan Employment Security Commission ("MESC") (234-237a). As part of the MESC process, plaintiff contacted exactly four companies looking for work (235a). Through these limited contacts, plaintiff claims that she was told that in order to obtain a job in the health insurance sales field, she needed a college degree and an insurance license (234-235a). Although plaintiff claimed to have contacted the BCN Human Resources department "frequently," searched the yellow pages for work, and communicated with other unnamed "sources" (157-160a), plaintiff actually applied for no jobs during the seven months that she received MESC benefits.

Applying the reasoning of Truskoski to the facts of case at bar, plaintiff's roughly seven months compliance with the work search requirements of the MESC in 1994 did not excuse plaintiff from her completely separate duty to mitigate damages after voluntarily quitting BCN two years later in 1996.

Second, plaintiff's cursory review of the yellow pages is analogous to scanning the newspaper for want ads. Such scant efforts of looking for work, without undertaking any further follow-up, has been held to be insufficient to satisfy a plaintiff's burden to mitigate damages. See EEOC v. Service News Co., 898 F2d 958, 963 (4th Cir. 1990)("Looking through want ads ... without more, is insufficient to show mitigation ..."); Booker v. Taylor Milk Co., Inc., 64 F3d 860, 865 (3rd Cir. 1995) (plaintiff failed to exercise reasonable diligence to mitigate damages where he did little more than register with Job Service and look through help wanted ads).

Third, plaintiff's contacting of only four potential employers over a seven month period in connection with applying for MESC benefits -- an average of less than one inquiry per month

-- has been held not to constitute a reasonable effort to mitigate in similar circumstances. See Payne v. Security Sav. & Loan Ass'n, F.A., 924 F2d 109, 111 (7th Cir. 1991) (upholding district court's finding that plaintiff did not take reasonable steps to mitigate damages where his job search efforts consisted of spending "two or three days a month" and "[a] few hours a week, maybe a month" looking for employment); Denesha v. Farmers Ins. Exchange, 161 F3d 491, 502 (8th Cir. 1998) (district court did not err in concluding that plaintiff failed to make an "honest, good faith effort" to mitigate damages where he made only a single application for employment in his area of expertise over a period of thirty-three months); Coleman v. Lane, 949 FSupp. 604, 612 (N.D. Ill. 1996) (plaintiff, whose efforts to find alternate employment over a two-year period consisted of submitting only four applications, and merely inquiring into three or four other positions, had not made a good faith effort to mitigate damages).[11]

Hasbrouck v. Bankamerica Housing Services, Inc., 105 FSupp 2d 31 (N.D.N.Y. 2000), is a case strikingly similar to the instant matter. Like the case at bar, the plaintiff in Hasbrouck alleged that she was discriminatorily discharged. She looked for work for three months after her termination from defendant in June of 1997 until she found another job. She then voluntarily quit the new job one-year later, in June of 1998. From the point that she quit the new job through the date of defendant's Motion for Summary Judgment was decided, a period of over

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[11] In rather cavalier fashion, plaintiff dismissed the notion that she should have revisited the job market after quitting BCN in September 1996, claiming that when she contacted the four companies during the seven month period in 1994, "I did a thorough investigation. There's no need to go back and find out what I already knew." (236-238a).

In Hayes v. Shelby Memorial Hosp., 546 FSupp 259 (N.D. Ala. 1982), aff'd 726 F2d 1543 (11th Cir. 1984), the court rejected a similar argument. In that case, plaintiff testified that she believed efforts to obtain employment after her termination would be "fruitless" because she was pregnant. However, plaintiff provided no testimony that she tested that assumption by checking classified advertisements, registering with employment agencies, or discussing job openings with acquaintances. Id., p. 266. Based on plaintiff's lack of effort in looking for work, the court denied plaintiff's request for backpay from the date of her discharge to the date she found her next job. Id. Like the claimant in Hayes, plaintiff in the instant case had the duty to look for work after she resigned, and cannot rest on her meager efforts undertaken in 1994, over two years before she voluntarily quit her job at BCN.

two years, plaintiff made no effort to look for any other work. In granting defendant's motion, the court noted that while the plaintiff may have looked for work before June of 1998, her failure to do so after that date meant that she completely failed to mitigate damages. The court held that the plaintiff was not entitled to front or back pay after June 1998. 105 FSupp 2d at 40.

Plaintiff may argue that in order to prove plaintiff failed to mitigate damages, defendant must show that there was comparable employment that plaintiff could have acquired. The majority view of federal courts of appeals addressing this issue have relieved employers from the burden of proving the availability of substantially equivalent jobs in the relevant geographic area once it has been shown that the former employee made no effort to secure suitable employment. See, e.g., Quint v. A.E. Staley Manuf. Co., 172 F3d 1, 15-16 (1999); Greenway v. Buffalo Hilton Hotel, 143 F3d 47, 54 (1996); Sellers v. Delgado College, 902 F2d 1189, 1193 (5th Cir. 1990); Weaver v. Casa Gallardo, Inc., 922 F2d 1515, 1527 (11th Cir. 1991). Defendant urges this Court to adopt the exception recognized by these cases; namely, that once an employer has shown that the claimant sought no jobs, it should be relieved of any burden to prove the existence of substantially equivalent positions. For this plaintiff, it would not have mattered if there were 10, 100, or 1000 jobs available in the marketplace. Accordingly, plaintiff's suggestion that an employer must introduce expert testimony to show that there are jobs available that a plaintiff who admittedly looked for no work could have applied for, not only is not required by law, but would amount to a waste of trial time. MRE 403. Defendant proved its mitigation defense by plaintiff's own testimony on the witness stand: Plaintiff admitted that she made the conscious choice not to look for any work after she quit BCN effective September 20, 1996 (234a).

In summary, the court of appeals erred in failing to cut-off economic damages as of the date plaintiff voluntarily quit her job at BCN, effective September 20, 1996, by instead

permitting plaintiff to rely on efforts undertaken two years before her resignation. A plaintiff has the affirmative duty to mitigate damages in a prospective fashion, after the date of discharge. Morris, supra. The court of appeals also erred in holding that the mere contacting of four companies and other unnamed "sources," telephoning the BCN Human Resources department, and scanning the yellow pages, constituted mitigation at all, when such efforts were undertaken in connection with the ritualistic requirements of obtaining MESC benefits.

Defendant urges this Court rectify the errors committed by the court of appeals by clearly articulating that a voluntary quit tolls all forms of economic damages. Moreover, in both the context of calculating back pay and front pay, a plaintiff must undertake a prospective (future) effort to mitigate damages under Michigan law Morris, supra, and may not rely on past efforts made in compliance with MESC job search requirements. The duty to mitigate forward is particularly important in this case and for other cases of a like nature, where plaintiff voluntarily quit her employment due to no fault of the employer.

3. The court of appeals erred in finding that plaintiff satisfied her duty to mitigate damages by enrolling in college on a casual basis instead of looking for work as required by Michigan law

Through its Opinion, the court of appeals created a new legal holding in this State, which excuses a discrimination plaintiff from the duty to look for work following a voluntary resignation, by enrolling in college. More specifically, the court of appeals held that:

> A decision to attend school only when diligent efforts to find work prove fruitless, however, or to continue to search for work even while enrolled in school, does meet this duty [to mitigate].
>
> ***
>
> [T]here was no evidence presented that plaintiff's decision to become a full-time student to obtain a bachelor's degree was undertaken for the purpose of reaping greater future earnings than she would have earned as an AR in the health insurance industry. ...

(48a) (citations omitted).

Before discussing plaintiff's minimal college "career" after she voluntarily quit BCN, defendant must mention an important "personal choice" plaintiff made prior to enrolling in college. At trial, plaintiff was asked why she did not continue to work at BCN on a full-time basis and enroll in college at night. Plaintiff responded that such an arrangement "wouldn't fit into my schedule, my personal schedule." Plaintiff explained that the only time she could take college courses was in the day because Tuesday, Thursday and Friday nights she had a martial arts course that she had to take (246-248a).

Thus, plaintiff made the personal choice to quit her job and enroll in college during the day instead of continuing to work at BCN. Plaintiff made this choice even though she had a three-day window to cancel her martial arts class contract after she signed it (248-249a). This evidence clearly shows where plaintiff's priorities were at the time she decided to voluntarily quit BCN: Plaintiff did not want to work. She wanted to personally enrich her life instead!

As previously indicated, plaintiff made the decision to enroll in college after being told in 1994 that a college degree was necessary to enter her field of choice, health insurance sales. (234-235a). Yet the classes plaintiff pursued after making that decision were completely unrelated to becoming qualified to sell health insurance or to obtain a health insurance license.

After quitting her job at BCN, plaintiff enrolled in one class in the spring of 1997. She failed it. In the 1997 fall term, plaintiff took one class, Sign Language I (244a, 460a). At the time of trial in March 1998, plaintiff was again taking only one class, Sign Language II (245a).

Plaintiff's course of action after quitting BCN is quite apparent. Instead of taking classes to become proficient in obtaining a license to sell health insurance, plaintiff pursued a career change. Perhaps the classes plaintiff took made her qualified to teach the hearing impaired, but such courses had nothing to do with selling health insurance, the reason plaintiff claims that she

quit work to enroll in college. The undisputed record shows plaintiff was never a full-time student, much less enrolled in a course of study related to her chosen profession, health insurance sales. Stated differently, plaintiff's education was not structured to foster re-entry into the job market.

Under federal law, an individual who does not search for work and decides instead to attend college generally does not meet her duty to mitigate damages during the time she is in school. See, e.g., Taylor v. Safeway Stores, Inc., 524 F2d 263, 267-268 (10th Cir. 1975) ("When an employee opts to attend school, curtailing present earning capacity in order to reap greater future earnings, a back pay award for the period while attending school also would be like receiving a double recovery"); United States v. Wood, Wire & Metal Lathers Int'l Union, Local Union 46, 328 FSupp 429, 444 (S.D.N.Y. 1971).

There are no cases in Michigan holding that enrollment in college excuses an individual from his or her duty to mitigate damages, much less when the classes taken bear no relationship to preparing the individual with the skills necessary to enter the marketplace to pursue his or her chosen field. The cases cited by the court of appeals in support of its holding that enrolling in college may excuse an individual from looking for work are inapposite.[12] They involved plaintiffs who seriously pursued a college education on a full time basis after exhausting all efforts to find a job. Plaintiff did not look for any work at all after she voluntarily quit BCN and enrolled in college on a casual basis. The court of appeals clearly erred in concluding that

[12] The cases cited by the court were Smith v. American Service Co., 796 F2d 1430 (11th Cir. 1996); Hanna v. American Motors Corp., 724 F2d 1300 (7th Cir. 1984); Brady v. Thurston Motor Lines, Inc., 753 F2d 1269 [4th] Cir. 1985).

enrolling in three classes during a two year period between the date of her resignation in 1996 and the date of trial, excused plaintiff from the duty to mitigate damages by looking for work.

In addition, the mitigation of damages requirement also requires the plaintiff, when in school, to remain "ready, willing and available" to enter the work force. Miller v. Marsh, 766 F2d 490, 492 (11th Cir. 1985) (holding that plaintiff failed to mitigate damages while in school "since she remained unavailable for any alternative employment"); Hanna v. American Motors Corp., 724 F2d 1300, 1308 (7th Cir. 1984) (plaintiff's education mitigated damages where plaintiff "applied for and was at all times, ready, willing and available to accept employment comparable to" his old job) cert. denied 467 US 1241, 82 L Ed 2d 821, 104 S Ct 3512 (1984).

Based on the undisputed record, plaintiff was not "ready, willing and available" to re-enter the job market when she enrolled in college on a casual basis. Quite to the contrary, when she voluntarily quit her employment at BCN effective September 20, 1996, plaintiff made the firm decision to not look for any work whatsoever. (234a). When plaintiff thereafter enrolled in college, this same mind-set continued. Plaintiff had no intention of looking for work while a student. (Id.). Plaintiff's irrevocable decision to take herself out of the job market as of September 20, 1996, was inconsistent with her duty to mitigate damages. Stated differently, plaintiff was not ready, willing and available for work once she enrolled in college on a casual basis. Miller, supra.

In its opinion, the court of appeals noted, without citing to any legal authority, that the fact that plaintiff took only a couple of classes is irrelevant "because plaintiff's damages were based on four years, i.e., the time it should take a full-time student to obtain a bachelor's degree." (50a, at n. 3) (emphasis added). The court of appeals completely missed the mark. Plaintiff was

never a full-time student. Instead, she took two "enrichment courses" over a course of nearly three years (and failed a third course).

In affirming a four-year award of front pay to finance this plaintiff's minimal, non-job related college education while, at the same time, completely excusing plaintiff from the duty to look for any work during her period in school, is punitive, unsupported by the law, and sets a disturbing legal precedent. To have affirmed the award of any amount of front pay for plaintiff, who removed herself from the job market and then took a couple of college courses having nothing to do with the occupation or license she wishes to pursue, represents the very type of "double-dip" windfall that the mitigation doctrine is designed to prevent.

Allowing a plaintiff to avoid the duty to mitigate damages by enrolling in college on a casual basis, instead of looking for work, finds no support in Michigan law. The holding has resulted in an award of damages that is ridiculously unfair, requiring, in essence, that defendant "subsidize" plaintiff with $136,000.00 in front pay when plaintiff not only looked for no work after quitting BCN, but who failed to enroll in college on a full-time basis. Indeed, the holding by the court of appeals sets a disturbing legal precedent affecting other employers that will only encourage plaintiffs "to purposefully remain unemployed in order to maximize recoverable damages," a result soundly condemned by this Court in Morris, supra, 459 Mich at 263.

For this reason, defendant respectfully requests that this Court correct this significant misinterpretation and extension of the mitigation doctrine in Michigan advanced by the court of appeals. If the Court is inclined to permit enrolling in college as an excuse for not mitigating damages, defendant believes that enrollment in college should be considered the rare exception to the general rule that a plaintiff must mitigate by looking for work. If such an exception to the general rule is recognized, defendant urges this Court to hold that for enrollment in college to

excuse the duty to mitigate by looking for work, a plaintiff must take classes that are *job related* to the occupation he/she wishes to pursue. Enrolling in recreational courses that had nothing to do with health insurance sales, such as Basic Sign Language I and II, as plaintiff did in this case, does not meet this standard. Plaintiff's enrollment in college, based on the curriculum she pursued, was for purely enrichment purposes. In addition, while enrolled in college, defendant believes that a plaintiff must remain "ready, willing, and able" to enter the work force. Miller, supra. In the case at bar, plaintiff made no attempt to hide the fact that she made the personal decision to look for no work after enrolling in college (234a).

In summary, given the finding by the court of appeals that (1) plaintiff voluntarily quit BCN and (2) plaintiff's admission that she, thereafter, took no steps to look for work, it should have concluded that plaintiff was not entitled to $125,000 in back pay or $136,000 in front pay. Plaintiff's enrollment in college on a casual basis, while at the same time completely removing herself from the job market during her time as a student, amounted to a complete failure to mitigate damages. Miller, supra. As a consequence of plaintiff's complete failure to mitigate, she is deprived of any entitlement to an award of any economic damages, either back pay or front pay. Therefore, this Court should summarily vacate the jury's award of back pay and front pay in this case. See Greenway, supra, 143 F3d at 54 (summarily vacating award for economic damages without remanding for new trial where plaintiff failed to mitigate damages by not looking for work).

4. This Court should declare that defendant's burden of proving that a plaintiff acted "unreasonably" in mitigating damages does not arise until plaintiff meets a "minimum threshold." Such threshold is not met as a matter of law when a plaintiff voluntarily quits a job and thereafter fails to undertake any effort to look for suitable replacement work

The relevant question in determining economic damages is whether the plaintiff made "reasonable efforts" to mitigate. Morris, p. 267 citing Rasheed, pp. 123-124. In Morris, the Court observed that the "reasonableness" of a job search is a factual question requiring a thorough evaluation of, for example, "the earnestness of a plaintiff's motivation to find work and the circumstances and conditions surrounding his job search, as well as the results of it." Rasheed, p. 271. Defendant ultimately must show that "the course of conduct plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek employment." Morris, p. 267 citing Dept. of Civil Rights v. Horizon Tube Fabricators, Inc., 148 Mich App 633, 638-639; 385 NW2d 685 (1986).

This standard is workable in most instances. In the typical employment discrimination case, a plaintiff is discharged, and proceeds to look for work. The issue of whether the plaintiff made "reasonable" efforts to mitigate by looking for work is a question reserved for the trier of fact, typically the jury.

Yet the case at bar does not represent the "typical" scenario facing employers defending employment discrimination lawsuits. Instead, this case involves a plaintiff who admittedly made no effort to look for any type of work after voluntarily quitting BCN, effective September 20, 1996 (234a). To protect employers and the public from having to subsidize an individual who quits work and thereafter purposefully remains idle looking for no replacement work, thereby doing nothing to "avoid[] economic loss," Morris, p. 263, a standard is necessary to declare such mitigation efforts as "unreasonable" as a matter of law.

Defendant urges this Court to adopt a burden-shifting approach in addressing the circumstances when the trial court, and not a jury, should decide whether a plaintiff's mitigation efforts are unreasonable. Under defendant's proposed approach, a defendant's burden of proving that the plaintiff's course of conduct was unreasonable, Morris, p. 267, does not begin until plaintiff meets an initial minimum threshold. Defendant believes that at a minimum, plaintiff must first introduce evidence that he/she looked for some type of work after the date of discharge or voluntary quit. Until plaintiff makes this initial minimum showing, the burden does not shift to defendant to prove such efforts are unreasonable. In the event plaintiff does not satisfy this initial threshold (e.g., admits like this plaintiff did, that she looked for no work after quitting), the trial court should grant a defendant's motion as a matter of law, cutting-off economic damages, due to the "unreasonable" failure to mitigate. The issue would not be submitted to the jury for determination.

Defendant's proposed standard does overrule the rule in Morris, that the defendant bears the ultimate burden of proving that a plaintiff's mitigation efforts are unreasonable. Morris, p. 267. If a plaintiff makes some showing that he/she looked for work, the employer will continue to have the burden of showing that such efforts were unreasonable. Nor will decisions on the *merits* of a discrimination claim be taken from the jury by the standard proposed by defendant. Even if a plaintiff made no effort to look for work after termination or quitting, the plaintiff can still have his/her case decided by a jury and seek other types of non-economic relief. However, this Court should place plaintiff's on clear notice that economic damages would be precluded as a matter of law in the event the plaintiff fails to meet the above-referenced minimum threshold.

In summary, the entire notion of "avoiding economic loss," the "thread permeating the entire jurisprudence" of mitigation, Morris, p. 266, cannot be accomplished when, as in the case

of this plaintiff, no efforts to look for work are made. When a plaintiff is terminated or voluntarily quits a job, and thereafter makes no effort to mitigate his/her economic loss, the plaintiff's course of action does not meet the "minimum threshold" necessary to shift the burden to the employer to prove that such mitigation efforts was "unreasonable." In other words, by looking for no work, plaintiff's course of action should be considered as a matter of law, "so deficient as to constitute an unreasonable failure to seek employment," Morris, p. 267, thereby disqualifying that plaintiff from an award of past or future economic damages.

By adopting this proposed burden-shifting approach as a part of Michigan jurisprudence, employers will be protected from large and speculative back pay and front pay awards, while plaintiffs will not receive an economic "wind fall" when no efforts are made to look for replacement work, as occurred here. Such a rule would not victimize the "honest" plaintiff, who will continue to have his/her economic claims decided by a jury when "reasonable" good faith efforts to mitigate damages are undertaken.

E. EVEN THOUGH THERE IS NO LIABILITY AGAINST DEFENDANT IN THIS CASE, THIS COURT SHOULD DECLARE THAT NON-ECONOMIC DAMAGES MAY ONLY BE AWARDED WHEN A PLAINTIFF PRESENTS DEFINITE AND SPECIFIC EVIDENCE OF EMOTIONAL DISTRESS WHICH PLAINTIFF FAILED TO INTRODUCE BELOW

In this case, the court of appeals affirmed a jury verdict that awarded plaintiff $90,000.00 in non-economic damages for emotional distress, including mental anguish, embarrassment and humiliation as a result of defendant's decision not to hire plaintiff as an AR (42-43a). Plaintiff testified that she earned approximately $22,000.00 at BCN (143-144a). Thus, the award of non-economic damages represented over four times plaintiff's annual salary at BCN.

Plaintiff relied only on her own personal testimony to support her emotional distress claim. Although Michigan law allows for recovery for mental anguish based on plaintiff's own

testimony, he or she must submit specific and definite evidence of mental anguish, anxiety, or distress. This Court has never found vague references to a feeling of "humiliation" sufficient to satisfy a plaintiff's burden of proof on this issue. Vachon v. Todorovich, 356 Mich 182, 188, 97 NW2d 122 (1959); Wiskotoni v. Michigan Nat'l Bank-West, 716 F2d 378, 389 (6th Cir. 1983) (applying Michigan law).[13]

In dissent, Judge Sawyer obviously was troubled by plaintiff's complete failure to introduce any "specific and definitive" evidence of mental anguish, anxiety or distress, as she was required to do. He voted to reverse the jury's award. (51-52a) (Sawyer, J, dissenting).

The following is the evidence plaintiff introduced at trial to support her claim for emotional distress damages:

Plaintiff testified that she was "very upset" when BCN Human Resources Manager Stone told her that her former job at BCN had been eliminated when she sought to return to work in May of 1994 (155a, lines 2-4). Without explaining why it was so, plaintiff testified that it was "very humiliating" to face former co-workers upon returning to work at BCN, and that she was "very upset" and "felt humiliated" by having to explain why she was not working at BCBSM (164a, lines 21-25 & 168a, lines 6-8). Plaintiff felt "very upset" at Curdy after upon her re-employment at BCN (168a, lines 11-12). Plaintiff finally added gratuitously that she felt that her future had been "stripped away" (173a, lines 6-8). In total, plaintiff's entire testimony on "mental anguish" is roughly 16 lines of transcript.

[13] See also Carey v. Piphus, 435 US 247, 262-63 & n. 20 98 S Ct 1042, 55 L Ed 2d 252 (1978) (while compensatory damages are recoverable under 42 USC §1983, such damages may not be presumed from every constitutional violation, but must be proven by competent, sufficient evidence). As the Equal Employment Opportunity Commission has made clear, "[ ] emotional harm will not be presumed simply because the complaining party is a victim of discrimination." EEOC Policy Guidance No. 915.002 § II (A)(2) (July 14, 1992) quoted in Vadie v. Mississippi State Univ., 218 F3d 365, 376 (5th Cir. 2000).

On cross-examination, plaintiff conceded that none of her co-workers ever ridiculed her about not receiving the AR job (184a). She enjoyed a good relationship with employees in the department. (Id.). Indeed, after BCN rehired plaintiff on December 16, 1994 (166a), plaintiff continued to work at BCN without incident. Plaintiff testified that she performed good work upon returning to BCN as a new hire, and received good performance reviews (168a). When she submitted her pleasant resignation letter on August 27, 1996, plaintiff mentioned nothing about emotional distress suffered during her employment at BCN or being upset in not becoming employed by BCBSM (459a).

Importantly, plaintiff admitted that notwithstanding not receiving the AR job, her personal life was not adversely affected in any manner whatsoever:

> Q. You enjoyed your co-workers. What was going on in your personal life which made you decide to quit and go to college instead of staying at Blue Care Network working and going to at Delta [College] at night?
>
> A. I guess I don't know what you mean. My personal life is fine too. That's not even relevant to why I'm here. I'm here by discrimination by Mike [Curdy]. It has nothing to do with my personal life.

(246a) (emphasis added).

This Court has never had the occasion to articulate standards by which courts should evaluate claims for compensatory damages in an employment discrimination context. However, federal courts have provided considerable guidance on this subject.

In Price v. City of Charlotte, North Carolina, 93 F3d 1241 (4th Cir. 1996), the Fourth Circuit Court of Appeals undertook a detailed examination on how various federal courts of appeal have addressed such issue. 93 F3d at 1250-1255.

In Price, seven white police officers sued the City of Charlotte pursuant to 42 USC §1983, contending that certain promotional practices violated the Equal Protection Clause of the

Fourteenth Amendment. At trial the evidence of the police officer's emotional distress consisted exclusively of their own testimony. 93 F3d at 1254. For example, in describing the emotional distress in testimony that consisted of a few pages of transcript, one of the Appellees, Officer Hall, testified that he felt "betrayed," "embarrassed," and "degraded." Id. Another Appellee, Officer Elstrom, testified that he felt "devastated," and "used like a pawn," and "betrayed." Id. The other Appellees offered similar vague testimony in support of their claim for compensatory damages. Id.

The Fourth Circuit noted that "courts scrupulously analyze an award of compensatory damages for claims of emotional distress predicated exclusively on the plaintiff's testimony." 93 F3d at 1251. In reversing the award of $3000.00 in compensatory damages awarded to each Appellee, the court explained that the evidence failed to show any "demonstrable emotional injury," given that Appellees' emotional distress "consisted exclusively of their own conclusory statements, which did not indicate how their alleged distress manifested itself." Id. at 1254:

> Here [Appellees] never offered evidence of any need for medicine, ...physical symptoms, psychological disturbance or counseling, ... loss of income or pecuniary expense, ... a description of their emotional distress, ... or how their conduct changed or if others observed their conduct change, ... Here, we are confronted with the bald, conclusory assertions that Appellees felt betrayed and deceived, but there was no evidence concerning any demonstrable injury suffered. Such vague, conclusory statements do not constitute sufficient evidence ...
>
> In reaching our conclusion, we do not hold that compensatory damages for emotional distress can never be awarded based exclusively on a plaintiff's testimony, ... but we simply hold that in this case, the testimony was insufficient to support an award of damages. Here, these officers did not 'reasonably and sufficiently explain the circumstances of [their] injury,' which cannot support an award of compensatory damages. 93 F3d at 1254-55 (citations omitted) (emphasis added).

Thus, an important component of proving compensatory damages is testimony, whether from the plaintiff or others, that is sufficiently articulated and that *explains* the nature of a demonstrable

emotional injury. On the other hand, vague, conclusory testimony is unacceptable because such evidence "easily susceptible to fictitious and trivial claims." 93 F3d at 1250.

In Brady v. Fort Bend County, 145 F3d 691 (5th Cir. 1998), several plaintiffs alleged that the former sheriff of Fort Bend County failed to rehire them based upon their exercise of their First Amendment rights of free speech and association, in violation of 42 USC § 1983. 145 F3d at 696. Plaintiffs' own testimony was the sole source of evidence on mental damages.

One plaintiff, Brady, testified that he had "spent more time on the couch in the last three years" because he "didn't feel like the same person," and that he suffered marital problems. Brady's testimony on mental distress was less than two pages of trial transcript. Id. at pp. 718-19. Another plaintiff, Chamblee, testified that the failure to rehire him caused sleeplessness, loss of appetite, and weight loss. He claimed that he "just couldn't accept it mentally." His testimony consisted of roughly 11 lines of trial transcript. Id. at 719. Evans, another plaintiff, testified that his job loss produced nervousness, sleeplessness, and anxiety, comprising of roughly 19 lines of trial transcript. Id. Another plaintiff, Fortenberry, testified that his loss of job made him "highly upset," prompting him to see a family doctor. His testimony consisted of roughly one page of trial transcript. Id. Leach, another plaintiff, also testified that the failure to rehire him caused nervousness and sleeplessness, and that the ordeal was not "fun," testimony that was roughly nine lines of trial transcript. Id. Finally, plaintiff Rosas described his experience as "the worst thing that ever happened to [him]," and that he was "shocked and devastated." His testimony was roughly two and a half pages of trial transcript. Id.

The Fifth Circuit held plaintiff's testimony was too vague and conclusory to support mental anguish damages. Id. Plaintiffs' conclusory descriptions of the manifestations of their emotional harm were devoid of detail, and without any hint of the severity of the alleged harm.

Conclusory statements, the court noted, "give the fact finder no adequate basis from which to gauge the 'nature and circumstances of the wrong and its effect on the plaintiff.'" Id., citing Carey, 435 US at 263-64.

The Fifth Circuit also noted that plaintiffs presented no medical or expert testimony confirming the emotional injuries allegedly suffered.[14] Nor did plaintiffs' present corroborating testimony from a spouse, family member, friend, or coworker. 145 F3d at 691.

In Nekolny v. Painter, 653 F2d 1164 (7th Cir. 1981), the Seventh Circuit reversed compensatory damages awards for emotional distress based on plaintiff's testimony that they were "very depressed," "a little despondent and [lacking] motivation," and "completely humiliated." Id., at 1172. Such testimony was insufficient to prove compensatory damages because "[a] single statement by a party that he was "depressed," "a little despondent," or even "completely humiliated," ... is not enough to establish injury ...." Id. at 1172-73.

In Spence v. Board of Education, 806 F2d 1198 (3d Cir. 1986), in affirming the remittitur of compensatory damages, the Third Circuit considered four factors: (1) the plaintiff did not lose the esteem of her peers; (2) the plaintiff suffered no physical injury as a consequence of her emotional distress; (3) the plaintiff received no psychological counseling; and (4) the plaintiff suffered no loss of income. 806 F2d at 1201.

In the case at bar, plaintiff's testimony clearly is not enough to support an award for compensatory damages. Plaintiff's testimony consists of her claim of being "very upset" and "humiliated" upon learning that her former job at BCN was eliminated, and when she had to answer questions from co-workers at BCN as to the reason for her not working at BCBSM as an

[14] In Bailey v. Runyan, 220 F3d 879, 881 (8th Cir. 2000), the Eighth Circuit observed that "[w]hile a plaintiff need not provide expert testimony, such testimony is not irrelevant. To the contrary, `this court and others recently have noted the probative value of expert psychological proof regarding causation of the claimant's depression and emotional distress.'" citing Jenson v. Eveleth Taconite Co., 130 F3d 1287, 1298 (8th Cir. 1997) (citations omitted).

AR. (155a, 164a, 168a). Plaintiff also claimed that her entire future was "stripped away" when she did not receive the AR job. (173a). This very type vague and conclusory testimony, consisting of a mere 16 lines of trial transcript, has been held insufficient to support a claim for emotional distress damages. See, Brady, 145 F3d at 719 (rejecting conclusory testimony of plaintiff Fortenberry that his loss of job opportunity made him "highly upset"); Nekolay, 653 F2d at 1172 (finding plaintiff's testimony that he was "completely humiliated" as insufficient to sustain award of compensatory damages).

In addition, the evidence does not provide any objective support that the alleged mental anguish affected plaintiff either on the job or in her personal life. Plaintiff continued to work at BCN in a supportive environment where she experienced no scorn for not receiving the BCBSM job (184a). When plaintiff was rehired by BCN in December 1994, she testified that her new supervisor, Angela Lawrence, was "excellent" to her (183-184a). There is no evidence that losing the employment opportunity at BCBSM caused plaintiff any physical trauma or affected her marriage in a negative way. It is undisputed that plaintiff received no treatment from a mental health professional or took medications for her alleged mental distress. Not one person – her spouse, family members, former co-workers or friends – testified in support of plaintiff's claim for emotional distress damages. Plaintiff admitted that her personal life at the time of trial was "fine" and that her lawsuit (and presumably her claim for emotional damages) had nothing to do with her personal life (246a).

Importantly, plaintiff's testimony supporting her alleged emotional distress was not linked to any alleged discrimination, a prerequisite to the award of compensatory damages. Price, 93 F3d at 1250 citing Carey, 435 US at 263. Rather, plaintiff's testimony was linked more to her reaction to the alleged perception *of others* upon her re-hire at BCN in 1994 (164a, 168a).

Because plaintiff's trial testimony was so vague and conclusory, it was virtually impossible for defendant to cross-examine plaintiff to test the veracity or credibility of her claim for emotional distress damages. The following hypothetical cross-examination represents the virtual impenetrable wall faced by defendant in this case given plaintiff's vague and conclusory testimony, and which other employers will experience under similar circumstances unless this Court establishes reasonable standards for proving compensatory damages:

> Q. You testified on direct examination that your entire future was "stripped away."
>
> A. That's right.
>
> Q. What do you mean by "stripped away"?
>
> A. Its just what I said, "stripped away," my entire career just vanished in front of me.
>
> Q. What evidence do you have to offer that your career was "stripped away"?
>
> A. Only what I said. Everything I worked for was taken away.

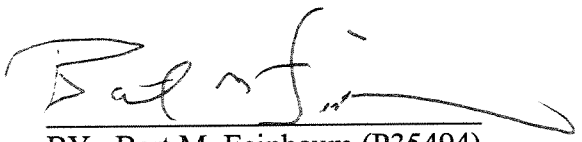
It has been over ten years since this Court last spoke on the issue of non-economic damages in the employment setting, and then it was merely a general reference to the availability of compensatory relief, without any guidance as to the evidentiary standard for proving such damages. Eide v. Kelsey-Hayes Co., 431 Mich. 26, 28-29, 55, 427 NW2d 488 (1988). Defendant urges this Court to provide this necessary guidance to the bench and bar, by considering the factors enumerated by those federal courts of appeal that have addressed this important topic. (See, e.g., Price, supra, in which the Fourth Circuit provides a detailed analysis on this subject). This Court should adopt the reasoning of dissenting Judge Sawyer, who found that plaintiff's testimony was neither specific nor definite (51-52a). There is no such evidence

supporting the runaway jury's $90,000.00 verdict for compensatory damages and defendant respectfully requests that this award be vacated in its entirety.

VI. RELIEF REQUESTED

In consequence of the foregoing, Defendant requests that this Court set aside the judgment below and dismiss plaintiff's case in its entirety for failure to establish a prima facie case of pregnancy discrimination. No remand is necessary. In the alternative, defendant requests that this Court vacate the award of non-economic damages, and direct that economic damages be cut-off as of the date plaintiff voluntarily quit her employment, September 20, 1996, as plaintiff made absolutely no effort to mitigate her damages after that date.

Respectfully submitted,



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IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

[JUDGES GRIBBS, KELLY, AND SAWYER]

MARCIA SNIECINSKI,

Plaintiff-Appellee,

vs.

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Defendant-Appellant.

Supreme Court No. 119407

Court of Appeals No. 212788 C

Wayne Circuit 96-616254-CZ
(Hon. Marianne O. Battani)

/

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CERTIFICATE OF SERVICE

I, JANET KEAN, certify that I served two copies of:

(1) Defendant-Appellant's Brief on Appeal;
(2) Defendant-Appellant's Appendix; and
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